TABLE OF CONTENTS

	Page
Citations	ii
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
Conclusion	22
Appendix A	1a
Appendix B	13a
Appendix C	27a
Appendix D	29a

CITATIONS

Page

Cases:

Alliance Industries, Inc., 198 NLRB No. 97 (1972) 19

B & W Maintenance Service, 203 NLRB No. 101 (1973) 19

Bachrodt Chevrolet Co., 186 NLRB No. 151 (1970); *enforced in part* 468 F2d 963 (7th Cir. 1972); *vac'd and rem'd* 411 US ___, 36 L Ed 2d 304, 93 S Ct 1547 (1973); 205 NLRB No. 122 (1973) 15, 19

Boeing Co. v *International Association of Machinists and Aerospace Workers, AFL-CIO*, 351 F Supp 813 (M.D. Fla. 1972) 17

Brockelman Bros., 122 NLRB No. 104 (1959) 19

Builders Realty & Mortgage Co., Inc. d/b/a Ramada Inn, 186 NLRB No. 87 (1970) 20

C. G. Conn, Ltd., 197 NLRB No. 84 (1972); *enforced* 474 F2d 1344 (5th Cir. 1973) 19

Columbia Marine Service, Inc., 191 NLRB No. 20 (1971) ... 19

Crotena Service Corp., 200 NLRB No. 97 (1972) 20

Denham Co., 187 NLRB No. 53 (1970); *modified* 469 F2d 239 (9th Cir. 1972); *vac'd and rem'd* 411 US ____, 36 L Ed 2d 407, 93 S Ct ___ (1973) 19

Dorrance J. Benzchawel, d/b/a Parkwood IGA, 201 NLRB No. 141 (1973) 20

Eastland Lanes, 194 NLRB No. 149 (1972) 19

Eklund's Sweden House Inn, 203 NLRB No. 56 (1973) 19

Emerald Maintenance, Inc., 188 NLRB No. 139 (1971); *enforced in part* 464 F2d 698 (5th Cir. 1972) 19

Emerald Maintenance, Inc. v *NLRB*, 464 F2d 698 (5th Cir. 1972) 18

Federal Electric Corp., 167 NLRB No. 63 (1968) 15, 20

Firchau Logging Co., 126 NLRB No. 149 (1960) 20

Foodway of El Paso, 201 NLRB No. 140 (1973) 19

G.T. & E. Data Services Corp., 194 NLRB No. 102 (1971) .. 19

Geronimo Service Co., 191 NLRB No. 88 (1971); *enforced* 467 F2d 903 (10th Cir. 1972) 19

Good Foods Manufacturing and Processing Corp., 195 NLRB No. 83 (1972); *reconsidered* 200 NLRB No. 86 (1972) .. 19

Guaranty Trust Co. v *York* 326 US 99, 89 L Ed 2079, 65 S Ct 1464 (1945) 14

Hecker Machine, Inc., 198 NLRB No. 161 (1972) 19

Howard Johnson Co., 198 NLRB No. 98 (1972) 19

International Union, Progressive Mine Workers of America v *NLRB*, 319 F2d 428 (7th Cir. 1963); rev'd other grounds 375 US 396, 11 L Ed 412, 84 S Ct 453 (1964) 18

Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v *Lucas Flour Co.*, 369 U S 95, 7 L Ed 2d 593, 82 S Ct 571 (1962) 21

K. B. & J. Young's Super Markets, Inc. v *NLRB* 377 F2d 463 (9th Cir. 1967) 8

Marion Simcox, 178 NLRB No. 85 (1969) 19

Michaud Bus Lines, Inc., 171 NLRB No. 21 (1968) 19

Milwaukee Engine & Equipment Corp., 198 NLRB No. 56 (1972) 19

Monroe Sander Corporation v *Livingston*, 377 F2d 6 (2nd Cir. 1967) 16, 17

NLRB v *Alamo White Truck Service, Inc.*, 273 F2d 238 (5th Cir. 1959) 15

NLRB v *Bachrodt Chevrolet Co.*, 468 F2d 963 (7th Cir. 1972); *vac'd and rem'd* 411 US ____, 36 L Ed 2d 304, 93 S Ct 1547 (1973); 205 NLRB No. 122 (1973) 7, 15

NLRB v *Burns International Security Services, Inc.*, 406 US 272, 32 L Ed 2d 61, 92 S Ct 1571 (1972) 7-16, 18

NLRB v *Denham*, 469 F2d 239 (9th Cir. 1972); vac'd and rem'd 411 US__, 36 L Ed 2d 407, 93 S Ct ___ (1973) 18

NLRB v *Geronimo Service Co.*, 467 F2d 903 (10th Cir. 1972) 18

NLRB v *Polytech, Inc.*, 469 F2d 1226 (8th Cir. 1972) 7, 16

NLRB v *John Stepp's Friendly Ford, Inc.*, 338 F2d 833 (9th Cir. 1964) 14, 15, 20

NLRB v *United Industrial Workers of the Seafarers International Union of North America, Atlantic Gulf, Lakes and Inland Waters District, AFL-CIO*, 422 F2d 59 (5th Cir. 1970) 15

NLRB v *Wayne Convalescent Center, Inc.*, 465 F2d 1039 (6th Cir. 1972) 12, 18

NLRB v *Zayre Corp.*, 424 F2d 1159 (5th Cir. 1970) 18

Overnite Transportation Co. v *NLRB*, 372 F2d 765 (4th Cir. 1967) 18

Owens-Illinois, Inc. v *District 65, Retail, Wholesale and Department Store Union, AFL-CIO*, 276 F Supp 740 (S.D.N.Y. 1967); aff'd 393 F2d 932 (2nd Cir. 1968) 17

Penn Bldg. Maintenance Corp., 195 NLRB No. 29 (1972) .. 19

Printing Specialties & Paper Products Union No. 447, International Printing Pressmen and Assistants Union of N.A., AFL-CIO, v *Pride Papers Aaronson Bros. Paper Corporation*, 445 F2d 361 (2nd Cir. 1971); cert. denied 404 US 1001, 30 L Ed 2d 553, 92 S Ct 564 (1971) 16, 17

Ranch-Way Inc., 183 NLRB No. 116 (1970); *enforced* 445 F2d 625 (10th Cir. 1971); *vac'd and rem'd* 406 US 940, 32 L Ed 2d 328, 92 S Ct 2037 (1972); 203 NLRB No. 118 (1973) 19

Ranch-Way Inc. v *NLRB*, 445 F2d 625 (10th Cir. 1971); vac'd and rem'd 406 US 940, 32 L Ed 2d 328, 92 S Ct 2037 (1972); 203 NLRB No. 118 (1973) 18

S – H Food Service, Inc., 183 NLRB No. 124 (1970); reconsidered 199 NLRB No. 4 (1972) 19

S.S. Kresge Co., 169 NLRB No. 61 (1968) 19

San Diego Bldg. Trades Council v *Garmon*, 359 US 236, 3 L Ed 2d 775, 79 S Ct 773 (1959) 21

Servico, 191 NLRB No. 125 (1971) 19

Spitzer Akron, Inc., 195 NLRB No. 24 (1972); enforced 470 F 2d 1000 (6th Cir. 1972); *vac'd and rem'd* ____ US ____, 36 L Ed 2d 955, 93 S Ct ____ (1973) .....

Spitzer Akron Inc. v *NLRB*, 470 F 2d 1000 (6th Cir. 1972); *vac'd and rem'd* ___ US ___, 36 L Ed 2d 955, 93 S Ct ___ (1973) 18

Southline System Services, Inc., 198 NLRB No. 71 (1972) .. 20

Spruce Up Corp., 194 NLRB No. 145 (1972) 19

John Stepp's Friendly Ford, Inc. 141 NLRB No. 94 (1963) . 19

Tallakson Ford, Inc., 171 NLRB No. 67 (1968) 15, 20

Textile Workers Union v *Lincoln Mills*, 353 US 448, 1 L Ed 2d 972, 77 S Ct 912 (1957) 13, 14, 21

Thomas Cadillac, Inc., 170 NLRB No. 92 (1968); *aff'd* 414 F2d 1135 (D.C. Cir. 1969) 20

Tom-A-Hawk Transit, Inc. v *NLRB*, 419 F2d 1025 (7th Cir. 1969) 18

Traginew Inc., 185 NLRB No. 132 (1970); modified 470 F2d 669 (9th Cir. 1972) 19

Triangle Maintenance Corp., 194 NLRB No. 85 (1971) 20

Tri State Maintenance Corporation v *NLRB*, 408 F2d 171 (D.C. Cir. 1968) 10

Triumph Sales, Inc., 154 NLRB No. 71 (1965) 20

Ugite Gas Inc., 126 NLRB No. 65 (1960) 19

United States Gypsum Co. v *NLRB*, ___ F2d ___, 84 LRRM 2129 (8th Cir. 1973) 18

United States Gypsum Co. v *United Steelworkers of America*, 384 F2d 38 (5th Cir. 1967); cert. denied 389 US 1042, 19 L Ed 2d 832, 88 S Ct 783 (1968) 17

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Wackenhut Corporation v *International Union, United Plant Guard Workers of America*, 332 F2d 954 (9th Cir. 1964)15, 17

Westgate Corp., 196 NLRB No. 54 (1972) 19

John Wiley & Sons v *Livingston*, 376 US 543, 11 L Ed 2d 898, 84 S Ct 909 (1964) 7, 8, 9, 10, 13, 14

Statutes:

Labor Management Relations Act (Public Law 101, 80th Cong. 1st Sess., 29 USC 141 et seq.) 7
Section 157 ..... 2, 11, 12
Section 158 ..... 8, 12, 13, 14
Section 158(a)(3) 3, 8
Section 158 (a)(5) 3, 8, 14, 18, 20
Section 185 ..... 2, 3, 8, 12, 13, 14, 16, 17, 18

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

HOWARD JOHNSON COMPANY, INC.

Petitioner

v

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Howard Johnson Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, pp. 1a-12a), is reported at ____ F2 ____, 83 LRRM 2804 (6th Cir. 1973); the opinion of the District Court for the Eastern District of Michigan, Southern Division (App. B, infra, pp. 13a-26a) is reported at ____ F Supp ____, 81 LRRM 2329 (E.D. Mich. 1972). The District Court's Order and subsequent Memorandum and Order Granting Stay Pending Appeal are attached as Appendices C and D, respectively.

JURISDICTION

The judgment of the Court of Appeals was decided and filed on July 12, 1973. This Petition for Certiorari was timely filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Is an employer who purchases the assets of a former owner a "successor employer" for purposes of federal labor law if thereafter it operates with different procedures and supervision, employs only nine of the fifty-three employees employed by the former owner, contractually refuses to assume the former owner's collective bargaining agreement, and a majority of its employees have not designated the union, which has exclusive bargaining status under such bargaining agreement, as their representative?

2. Is an employer who purchases assets required, in an action under Section 301 of the Labor Management Relations Act, 29 USC § 185, to arbitrate the extent to which a labor contract, to which it is not a party, imposes obligations upon it if such employer employs a new labor force in which the employees employed by the former owner do not constitute a majority of either such employer's employees or the former owner's employees?

STATUTES INVOLVED

The relevant provisions of the Labor Management Relations Act, as amended, 29 USC 141 et seq. are as follows:

> Section 157: Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected

by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 158(a): It shall be an unfair labor practice for an employer . . .

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; . . .

* * *

(5) to refuse to bargain collectively with the representatives of his employees . . .

Section 185(a): Suits for violation of contracts between an employer and a labor organization representing employees employed in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioner, Howard Johnson Company, Inc., on June 16, 1972, agreed with Charles T. Grissom, P. L. Grissom & Son, Inc., and Belleville Restaurant Company[1] to purchase certain assets for use in the operation of a Howard Johnson restaurant and motor lodge located in Belleville, Michigan. Grissoms had previously operated the restaurant and motor lodge as franchisees of Peti-

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[1] For convenience, Charles T. Grissom, P. L. Grissom & Son, Inc., and Belleville Restaurant Company will hereafter be referred to as Grissoms.

tioner. At the time of the purchase, Grissoms had collective bargaining agreements with Respondent, Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, which covered employment terms and conditions for Grissoms' employees in the restaurant and motor lodge. Respondent's agreement with Grissoms for the motor lodge was effective for the period August 1, 1968, to August 1, 1972. Respondent's agreement for the restaurant employees was effective for the period January 1, 1968, to March 31, 1971, and extended by addendum until May 1, 1974. Both of Respondent's labor agreements with Grissoms contained a grievance procedure culminating in arbitration. The arbitration provision in the motor lodge agreement is representative and provides for the initiation of arbitration, and the selection and authority of the arbitrator:

> Section 1. If an employee has a grievance under the terms and provisions of this Agreement, it shall be handled in the manner hereinafter set forth:
>
> * * *
>
> *Step 3.* If the grievance cannot be settled by Step 2, it shall be presented by the Union to the Employer who shall make a decision in two (2) weeks. If the decision of the Employer is unacceptable either to the Union or to the Employer, either party shall have the right to demand arbitration in accordance with the following step.
>
> *Step 4.* The arbitrator shall be selected from a list furnished by the American Arbitration Association within two (2) weeks after such list is furnished to the parties. Upon the appointment of an arbitrator selected from a list furnished by the American Arbitration Association, the subject matter of the grievance shall be submitted to the arbitrator within five (5) days after the selection of the arbitrator unless the parties mutually agree upon a longer period of time. Evidence shall be submitted by both parties within ten (10) days thereafter. The decision of the arbitrator shall be final and conclusive

upon both parties and both parties agree to abide by the award of the arbitrator. The fees and expenses of the arbitrator shall be shared equally between the parties. Failure of the parties to agree upon an arbitrator within the period of time set forth above shall give the employee the right to strike to solve unsettled grievances.

Section 2. An arbitrator shall not have any right or authority to add to, subtract from or modify the terms and provisions of this Agreement. Further, the renewal, extension, modification or amendment of this Agreement shall not be subject matter of any grievance or arbitration procedure. (Joint Appendix on Appeal, p. 100)

After reaching agreement with the Grissoms for purchase of certain assets, Petitioner began to hire its own employees and to prepare for instituting its own operational procedures for the restaurant and motor lodge. During early July, 1972, Petitioner advertised for employees through newspapers and notices posted in various places, including the motor lodge and restaurant. On July 12, 1972, Petitioner commenced interviewing applicants for employment at a Howard Johnson facility in Ann Arbor, Michigan. Petitioner hired its first employee on July 18th and two days later began a training program for its employees. When it began operations on July 24, 1972, Petitioner had thirty-three employees in the restaurant and twelve in the motor lodge. Of these employees, only 9 restaurant employees had previously worked for Grissoms; while none of the lodge employees had previously worked for Grissoms. Thus, seventy-three percent (73%) of Petitioner's restaurant employees and one hundred percent (100%) of its lodge employees had never worked for Grissoms, nor been represented by Respondent, nor covered by Grissoms' labor agreements with Respondent.

On July 9, 1972, prior to the closing of the purchase agreement between Grissoms and Petitioner, Grissoms distributed a notice to their restaurant and motor lodge employees which stated:

Notice is hereby given that as of midnight July 23, 1972, your employment with Belleville Restaurant Company, a

> Michigan corporation, shall be terminated unless the last date you are scheduled to work is prior to midnight July 23, 1972, which date will be the termination date of your employment.
>
> All vacation accrued up to midnight, July 23, 1972, as well as pay earned as of said date, will be paid on July 24, 1972. (Joint Appendix on Appeal, p. 88)

On July 11, 1972, Petitioner notified Respondent in a telephone conversation that:

> "The Howard Johnson Company does not accept or recognize any alleged contracts for either the Restaurant or the Motor Lodge or any successor clauses contained therein. It will not recognize the Union as the bargaining representative for the Restaurant or Motor Lodge unless or until it is certified by the National Labor Relations Board as the bargaining representative of employees in an appropriate unit." (Joint Appendix on Appeal, p. 35)

Later, Petitioner again advised Respondent that it would hire its own employees and would not merely hire all of Grissoms' terminated employees. (Joint Appendix on Appeal, p. 90).

On July 21, 1972, Respondent filed suit in state court against Grissoms and Petitioner to require both Grissoms and Petitioner to arbitrate and to rehire and/or reinstate Respondent's members. The case was removed to the Federal District Court for the Eastern District of Michigan, Southern Division. During proceedings before the District Court, Grissoms stipulated to the entry of an order requiring arbitration of their liability under the collective bargaining agreements. On August 22, 1972, the District Court entered a memorandum opinion finding Petitioner a successor employer and thereby bound to arbitrate the applicability of the terms and conditions of Grissoms' labor agreements with Respondent. After timely appeal, the Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Sixth Circuit Court of Appeals Failed to Apply the Decision of this Court in *Burns*.

This case presents an important issue in the development of a uniform federal labor law under the Labor Management Relations Act, 29 U.S.C 141 et seq. ("Act"): whether an employer, a great majority of whose work force were not employees of the former owner, is a "successor employer" and, therefore, required to arbitrate the applicability of its predecessor's labor agreement. Additionally, this case involves the perplexing issues relative to the proper interpretations and interrelationship of *John Wiley & Sons* v *Livingston*, 376 US 543, 11 L Ed 2d 898, 84 S Ct 909 (1964) and *NLRB* v *Burns International Security Services, Inc.*, 406 US 272, 32 L Ed 2d 61, 92 S Ct 1571 (1972).

This Court in *NLRB* v *Burns International Security, Inc.*, *supra*, clarified the law as to the obligations of successor employers in the labor relations area. In *Burns*, the Court found that the employer had a duty to bargain only "when it selected as its work force the employees of the previous employer to perform the task at the same place they had worked in the past".[2] Stated conversely, under *Burns* an employer cannot be a successor[3]

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[2] 406 US at 278. Justice White, writing the majority opinion in *Burns*, stated: "Burns' obligation to bargain with the Union over terms and conditions of employment *stems from its hiring of Wackenhut's employees* and from the recent election and Board certification. It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period, if a majority of employees after the change of ownership or management were employed by a preceding employer". (Emphasis added) 406 US at 278-279.

[3] The Eighth Circuit in *NLRB* v *Polytech, Inc.*, 469 F2d 1226, 1230 (8th Cir. 1972), stated: "Under *Burns*, it is the number of new employees and whether they are a majority that is important." The Seventh Circuit in *NLRB* v *Bachrodt Chevrolet Co.*, 468 F2d 963 (7th Cir. 1972); vac'd & rem'd 411 U.S. ——— , 36 L Ed 2d 304, 93 S Ct 1547 (1973); 205 NLRB No. 122 (1973), held that the purchasing employer was a successor because it planned to retain all of the seller's employees and ultimately hired a majority of the seller's employees. In its opinion, the Court stated: "In *Burns*, the duty to bargain did not mature until late June, at the point when it became clear that the successor had hired the requisite complement of his predecessor's employees." 468 F2d at 969.

unless and until either a majority of its work force is comprised of the predecessor's employees, or it hires a majority of the predecessor's employees.[4] The only exception to the *Burns* criteria recognized by the federal courts, prior to the Sixth Circuit's decision, involved an employer who unlawfully discriminates against the predecessor's employees by refusing to hire them to avoid successorship status.[5] Such discriminatory conduct is prohibited by Section 158(a)(3) of the Act. Respondent does not allege in this case, nor did it file a charge with the National Labor Relations Board ("NLRB") alleging that Petitioner's refusal to hire Grissoms' employees is discriminatory.

The Sixth Circuit refused to apply this Court's *Burns* criteria because it viewed *Burns* as inapposite since it involved an alleged violation of Section 158(a) (5) of the Act rather than Section 185(a) of the Act.

This is fundamental error, for the determinative criterion for successorship is whether Petitioner has employed a majority of its predecessor's employees, and not whether a particular case arises under Section 158 or Section 185 of the Act. The initial determination must concern the composition of Petitioner's labor force, for it is this determination which controls whether a collective bargaining contract of another employer is to be applied to it. The Court below improperly held that the contract of a former employer could be applied to determine obligations of Petitioner and rights of Petitioner's employees even though the great majority of Pefitioner's employees were not employed by the former employer nor represented by Respondent. Petitioner's liability, if

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[4] There has been some confusion surrounding the "majority of employees" concept. Various courts apply it per *Wiley* - i.e., construing it to mean a majority of the predecessor's employees. Other courts have used it to refer to an existing majority of former employees in the new employer's work force. This distinction is irrelevant for purposes of this case, since Petitioner's labor force did not include either type of majority. Unless otherwise indicated, the term "majority of employees" encompasses both situations.

[5] See *K. B. & J. Young's Super Markets, Inc.* v *NLRB*, 377 F2d 463 (9th Cir. 1967); enforcing 157 NLRB 271 (1966).

any, under a labor contract follows only if Petitioner is a successor, and, under *Burns*, Petitioner is a successor only if the majority of its employees come from the predecessor's labor force. If this were not so, every purchaser of a business desiring to continue its operation, even though with all new employees, would be required to take such part of its predecessor's labor contract as an arbitrator should decide. This does mean, if the arbitrator wishes, that the employer must recognize the exclusive bargaining status of the union and the seniority of the predecessor's employees.

The Sixth Circuit and the District Court justified this erroneous result on an unwarranted extension of *John Wiley and Sons* v *Livingston, supra.*

In *Wiley*, this Court held that "in the context of a merger situation against a background of state law which embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation," the surviving corporation which employed all of the predecessor's employees is required to arbitrate the grievances of such employees, and only such employees. The *Wiley* determination is based on a fact situation clearly not present in this case – Wiley continued to employ the same persons employed by the predecessor employer to perform the same work.

Nothing in *Wiley* permitted arbitration so as to apply a contract to the successor's employees, but only to employees hired by the successor who were specifically covered by the labor contract between the union and the former owner.[6]

As interpreted in *Burns*, *Wiley* is not an open-ended decision which makes a predecessor's labor agreement binding in any respect on a new employer, such as Petitioner, which has not

[6] In footnote 5 of the *Wiley* decision, this Court stated:

> "The fact that the Union does not represent a majority of an appropriate bargaining unit in Wiley does not prevent it from representing those employees who are covered by the agreement which is in dispute and out of which Wiley's duty to arbitrate arises."

The most that can be said for *Wiley* is that *if* Petitioner had made a "wholesale transfer" of Grissoms' employees, arbitration would have been appropriate for Grissoms' former employees. Such arbitration, however, has no validity when Grissoms' former employees represent such a small percentage of Petitioner's labor force – far from the "wholesale transfer" of employees present in *Wiley*.

employed a majority of the predecessor's employees, is not liable for the predecessor's debts and obligations, and has not expressly assumed the predecessor's labor agreement.[7]

There is no law or contract binding on Petitioner which would require Petitioner to hire or to continue to employ its predecessor's employees, yet the Court below has determined that an arbitrator may decide, on the basis of a predecessor's collective bargaining agreement, to which Petitioner was not a party, that the predecessor's employees have employment rights and that Petitioner has contractual obligations. Nothing in this Court's *Wiley* decision justified such a conclusion. Significantly, this conclusion is directly in conflict with the decision of the Court of Appeals for the District of Columbia in *Tri State Maintenance Corp.* v *NLRB*, 408 F2d 171 (D.C. Cir. 1968).[8]

The decision of the Court of Appeals imposes on Petitioner, on the basis of a predecessor's labor agreements, to which Petitioner was not a party and which did not apply to eighty percent of Petitioner's employees, an open-ended obligation of arbitration. Issues for the arbitration would include whether, in the first instance, Petitioner is required to take Grissoms' employees when it purchased assets from the Grissoms, what employment rights the predecessor's employees have, and whether Petitioner has contractual obligations which foreclose it from hiring its own labor force.

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[7] In *Burns*, Justice White, speaking for the Court concerning the precedential value of *Wiley*, stated: "Rather, the claim is that Burns must be held bound by the contract executed by Wackenhut, whether Burns has agreed to it or not and even though Burns made it perfectly clear that it had no intention of assuming that contract. *Wiley* suggests no such open-ended obligation. Its narrower holding dealt with a merger occurring against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation." 406 US at 286.

[8] The Court there stated: "In the long history of labor law in this jurisdiction there simply is no authority which would require a maintenance corporation which contracts to service a building for a one year period to hire "en masse" the entire work force employed by the corporation or sole proprietor which or who had contracted to service the building for the previous one year period." 408 F 2d at 173.

Such obligation would necessarily infringe on the rights of employees hired by Petitioner who, exercising their rights under Section 157 of the Act, refrain from joining and/or designating the Respondent as their collective bargaining representative. It further infringes on Petitioner's right to employ its own labor force.[9]

The impact of the Sixth Circuit's decision is not only to foreclose Petitioner from hiring its own employees, but also from establishing terms and conditions of employment when it purchases assets of a predecessor, unless an arbitrator decides it may do so. This result is both contrary to this Court's rationale in *Burns*[10] and to the Sixth Circuit Court of Appeals' own decision

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[9] Justice White, in his opinion for the Supreme Court in *Burns*, stated: "We also agree with the Court of Appeals that holding either the Union or the new employer bound to the substantive terms of an old collective bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital." 406 US at 287-288.

[10] In *Burns*, Justice White, pointing out why a predecessor's contract is not binding on a successor, stated: "The Board's position would also raise new problems, for the successor employer would be circumscribed in exactly the same way as the predecessor under the collective bargaining agreement. It would seemingly follow that employees of the predecessor would be deemed employees of the successor, dischargeable only in accordance with provisions of the contract and subject to the grievance and arbitration provisions thereof. Burns would not have been free to replace Wackenhut's guards with its own except as the contract permitted. Given the continuity of employment relationship, the preexisting contract's provisions with respect to wages, seniority rights, vacations, privileges, pension and retirement fund benefits, job security provisions and the like would devolve on the successor . . . A successor employer might also be deemed to have inherited its predecessor's preexisting contractual obligations to the union that had accrued under past contracts and that had not been discharged when the business was transferred." 406 US at 288-289.

in *NLRB* v *Wayne Convalescent Center, Inc.*, 465 F2d 1039 (6th Cir. 1972) wherein the Court specifically stated that an employer who did not hire a majority of its predecessor's employees may establish its own terms and conditions of employment.[11]

It is the very essence of the national labor policy that a union must represent a majority of employees in an appropriate bargaining unit prior to being entitled to the status of an exclusive bargaining agent. The Court of Appeals decision derogates from this established policy since it imposes upon Petitioner and its employees the duty to arbitrate under a contract which both states that the Union is the sole representative of the employees and requires union membership as a condition of employment, although the employees have had no opportunity to determine the question of representation. This contract interpretation, which the arbitrator is authorized to make under the Court's decision, is contrary to Section 157 of the Labor Management Relations Act.

II. The Sixth Circuit's Decision, by Applying Different Standards to §185 Cases as Opposed to §158 Cases, Both Creates a False Dichotomy Prohibited by this Court's Mandate to Fashion a Single, National Labor Law and Encourages Forum Shopping.

In its opinion, the Sixth Circuit adopts the theory that different standards for determining "successorship" are applicable to

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[11] The Court in *Wayne Convalescent* stated: "While it is clear that Wayne was under a duty to bargain with the union as the employee's representative, it does not follow that the unilateral changes in conditions of employment that Wayne made sometime in June, 1970 were violations of such duty. In *NLRB* v *Burns International Security Services, Inc., supra*, the Supreme Court held that a sucessor could establish the initial basis on which it hired the predecessor's employees without consulting the union representatives and without committing an unfair labor practice." 465 F2d at 1042.

actions brought under §185 in the federal district court than to §158 proceedings before the NLRB.[12] No such dichotomy is warranted either by the statutes involved or consistent interpretations of federal labor law. In fact, such a dichtomy is specifically prohibited by this Court's decision in *Textile Workers Union* v *Lincoln Mills*, 353 US 448, 1 L Ed 2d 972, 77 S Ct 912 (1957):

> "The question then is, what is the substantive law to be applied in suits under §301? We conclude that the substantive law to apply in suits under §301 (a) is federal law which the courts must fashion from the policy of our national labor laws (Citations omitted). The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanctions but will be solved by looking at the policy of legislation and fashioning a remedy which will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problems." 353 US at 456-457.

This dichotomy, admittedly created by the Court of Appeals,[13] will result in widespread forum-shopping and will be a continuing

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[12] In its opinion, the Sixth Circuit, comparing the standard for determining successorship in a §185 (§301) case to a §157 unfair labor practice charge, stated:

> "Apparently the same considerations apply to actions under §301 (§185) of the LMRA." (Appx. A, p. 5a.).

Nevertheless, the Court later held:

> "Furthermore, we do not deem the refusal to hire a majority of Grissoms' employees to preclude the finding of successorship, *at least in this §301 case.*" (Emphasis added) (Appx. A, p. 7a).

The Court thus creates in its specific holding a distinction in the standards for determining successorship in §185 and §158 cases.

[13] In footnote 13 of its opinion in this case, the Court of Appeals for the Sixth Circuit acknowledged that it had sanctioned the dichotomy: "The [defendant] suggests that the approach adopted in this case will make the employees' and the employer's rights contingent on the choice of forum. We do not disagree with this characterization, but feel that it follows from the first ground on which *Burns* distinguished *Wiley* – that the NLRB is expressly limited by Sec. 8(d) of the Act while an arbitrator is under no such restrictions."

source of confusion for the Courts, the NLRB, and those affected by application of federal labor law.

The Sixth Circuit's decision leads to the following result: if a union does not want the existing contract, but only the right to bargain, and represents a majority of employees, it may abandon the contract and institute unfair labor practice charges before the National Labor Relations Board for a bargaining order. Conversely, if the union wants the labor contract, and does not represent a majority of the employees, it can sue in federal district court for arbitration and seek enforcement of the agreement and employment of its members. Furthermore, if the union knows that it cannot achieve recognition through a §158 (a)(5) unfair labor practice charge because the employer is not a successor employer as defined by the NLRB, the union will simply circumvent the NLRB by pursuing a §185 action through the courts in the hopes that the new employer will be compelled to arbitrate. The possible result of such arbitration is that the employer will not only be forced to recognize the union but be bound by the contract or parts thereof. Such forum-shopping is in derogation of the principle established by this Court in *Textile Workers Union* v *Lincoln Mills, supra.*[14] The need for a ruling by this Court on the precise issue of the nature of successorship in the twin contexts of §185 *(Wiley)* and §158 *(Burns)* is essential for the development of a uniform federal labor law. Moreover, it is essential that this Court clearly rule on the impact of its *Burns* decision on cases arising under §185 of the Act.

III. The Decision of the Sixth Circuit Court of Appeals is in Conflict with All Applicable Decisions of Other Circuits on the Issue of Successorship.

There is at present a clear conflict between the decision in this case and the position adopted by several United States Courts of Appeal. In *NLRB* v *John Stepp's Friendly Ford, Inc.*, 338 F2d 833 (9th Cir. 1964), the Ninth Circuit Court of Appeals reversed an NLRB finding of successorship where a majority of the em-

[14] In another context, see *Guaranty Trust Co.* v *York*, 326 US 99, 89 L Ed 2079, 65 S Ct 1464 (1945), where this Court stated: "The operation of a double system of conflicting laws. . .is plainly hostile to the reign of law." 326 US at 112.

ployer's work force was not composed of persons formerly employed by its predecessor.[15] The Court specifically ruled that the controlling question on the issue of successorship is whether the new owner may rationally be said, as to the unit in question, to have taken over and succeeded to his predecessor's employees. In resolving this question, the Ninth Circuit stated:

> "If he has not – if, on the contrary, he has within the unit in question secured his own employees – then he is not, as to the employees in question, a successor. He is their original employer. In such case both the employer and the employee unit are strangers to the certification and to the election upon which it was based. Nothing remains of the relationship to which the certification attached." 338 F2d at 836.

Subsequent to *John Stepp's Friendly Ford*, the NLRB expressly adopted the Ninth Circuit's approach.[16]

The Fifth Circuit has also expressly adopted the Ninth Circuit's approach. In *NLRB* v *Seafarers Union*, 422 F2d 59 (5th Cir. 1970), the Fifth Circuit quoted the above passage from *John Stepp's Friendly Ford* with favor, and held that there must be majority status before a new owner can be deemed a successor.[17]

Similarly, in *NLRB* v *Bachrodt Chevrolet Co.*, 468 F2d 963, 967 (7th Cir. 1972), the Seventh Circuit Court of Appeals predicated its determination of successorship on the fact that the new owner hired "over twenty-two of the twenty-four employees in the bargaining unit". It should be noted that this Court vacated the Circuit's decision with instructions to remand the case to the NLRB for reconsideration in light of *Burns*. See 411 US____, 36 L Ed 2d 304, 93 S Ct 1547 (1973). On remand, the NLRB affirmed successorship, largely on the basis that the employer had taken its predecessor's labor force. *Bachrodt Chevrolet Co.*, 205 NLRB No. 122 (1973).

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[15] See also *Wackenhut Corporation* v *International Union, United Plant Guard Workers of America*, 332 F2d 954 (9th Cir. 1964), wherein the Court of Appeals for the Ninth Circuit held that for successorship to exist, a majority of the predecessor's employees must be employed.

[16] See *Tallakson Ford, Inc.*, 171 NLRB No. 67 (1968); *Federal Electric Corp.*, 167 NLRB No. 63 (1968).

[17] See also *NLRB* v *Alamo White Truck Service*, 273 F2d 238 (5th Cir. 1959).

Additionally, the Eighth Circuit, in *NLRB* v *Polytech, Inc.*, 469 F2d 1226, (8th Cir. 1972), adopted this Court's *Burns* rationale to determine successorship:

> "At the time of the Union's request for recognition, Polytech, Inc. had 7 production employees, 4 of whom were formerly employed by Polytech Company. *Under Burns it is the number of new employees and whether they are a majority that is important* . . . Furthermore, where a majority of the new employees are employed by the predecessor, this has been held to constitute a retention of employee identity." (Emphasis added) 469 F2d at 1230.

Clearly, the Eighth Circuit Court of Appeals rationale as reflected in *Polytech* is specifically at variance with the Sixth Circuit Court of Appeals' decision in the instant case.

The Sixth Circuit Court of Appeals in its opinion discusses *Monroe Sander Corporation* v *Livingston*, 377 F2d 6 (2nd Cir. 1967) in the context of its holding on successorship. The Sixth Circuit properly characterized *Monroe Sander* as the only § 185 action where successorship was found absent a finding that the new employer hired a majority of employees. *Monroe Sander*, however, is clearly not applicable, and it is noteworthy that the Court of Appeals, in its holding on successorship, did not cite *Monroe Sander*, nor any other authority.

Monroe Sander, in essence, involved a single employing enterprise, American Petrochemical Corporation ("Petrochemical"), which manufactured paints, lacquers, varnish and enamels through Monroe Sander, a wholly-owned subsidiary. Monroe Sander had a labor agreement. Petrochemical decided to close the Monroe Sander plant and transfer the operations to the plant of a new subsidiary. The Union brought a § 185 action to compel arbitration, which was granted. Thus, *Monroe Sander* involved the obligations of interrelated companies and *not* the obligation of an independent purchaser of assets such as Petitioner. The Second Circuit cited this distinguishing factor and its importance in *Printing Specialties & Paper Products Union No. 447, International Printing Pressmen and Assistants Union of N.A., AFL-CIO* v *Pride Papers Aaronson Bros. Paper Corporation*, 445 F2d 361, 364 (2nd Cir. 1971), wherein the Court declined to find successorship or to impose the collective bargaining agreement upon an "unwilling party who had no part in the negotiation of the agreement".

In footnote 1 of its *Printing Specialties* opinion, the Second Circuit, commenting on *its own decision* in *Monroe Sander*, stated:

> "In *Monroe Sander Corp.* v *Livingston* (Citation omitted), we found a successorship although none of the former employees were hired by the successor corporation. In that case, however, continuity was evidenced by many factors, *not the least of which was the fact that the transaction involved a parent corporation's termination of one subsidiary plant and the purchase of another.*" (Emphasis added)

See also, *Owens-Illinois, Inc.* v *District 65, Retail, Wholesale, and Department Store Union, AFL-CIO*, 276 F Supp 740 (S.D.N.Y. 1967); aff'd 393 F2d 932 (2nd Cir. 1968).

The essential issue in *Monroe Sander* was whether Petrochemical and its subsidiary Monroe Sander, *parties to the collective bargaining agreement in question*, should be required to arbitrate – not whether the purchaser of assets of an unrelated corporation is bound to arbitrate under the latter's collective bargaining agreement. Petitioner submits that *Monroe Sander* is so factually distinguishable that it does not constitute legal authority in the present case.

With the exception of *Monroe Sander*, every §185 case decided by a Court of Appeals in which arbitration was ordered involved a new employer whose labor force contained a "majority of employees."[18] Especially relevant here is *Boeing Co.* v *International Association of Machinists and Aerospace Workers, AFL – CIO*, 351 F Supp 813 (M.D. Fla. 1972), currently on appeal to the Fifth Circuit. In *Boeing*, a §185 case wherein the alleged "successor" did not hire a "majority of employees," the District Court held as follows:

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[18] See *Wackenhut Corporation* v *International Union, United Plant Guard Workers of America*, 332 F2d 954 (9th Cir. 1964); *United Steelworkers of America* v *Reliance Universal Inc.*, 335 F2d 891 (3rd Cir. 1964); *United States Gypsum Co.* v *United Steelworkers of America*, 384 F2d 38 (5th Cir. 1967); cert. denied 389 US 1042, 19 L Ed 2d 832, 88 S Ct 783 (1968); *Printing Specialties & Paper Products Union No. 447, International Printing Pressmen and Assistants Union of N.A., AFL-CIO* v *Pride Papers Aaronson Bros. Paper Corporation*, 445 F2d 361 (2nd Cir. 1971); cert. denied 404 US 1001, 30 L Ed 2d 553, 92 S Ct 564 (1971)

> "*Burns* held that Burns had the duty to bargain with the Union with which Wackenhut had had a collective bargaining agreement but that it (Burns) was not bound by the terms of the contract. That holding appears to have been based on finding Burns the successor to Wackenhut *as a result of employing a majority of Wackenhut employees.* In the case at bar Boeing did not meet that standard of successorship and this Court holds therefore that it was not a successor to TWA." (Emphasis added) 351 F Supp at 816.

Additionally, in every NLRB determination reviewed by a Court of Appeals which involved successorship, the Court has upheld a bargaining order only where the new employer employed a majority of employees or there was a finding that the new employer's refusal to employ such persons was discriminatory.[19] In no case, except the Sixth Circuit's decision herein, has a Court of Appeals ordered a new employer, who has not taken a "majority of employees" or who has not discriminatorily refused to employ the predecessor's employees, either to arbitrate under § 185 or bargain under § 158 (a) (5) of the Act.

IV. The Decision of the Sixth Circuit Court of Appeals on Successorship Contravenes Well-Established NLRB Authority

The decisions of the District Court and the Court of Appeals for the Sixth Circuit are clearly contrary to the successorship doc-

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[19] See *Overnite Transportation Co.* v *NLRB*, 372 F2d 765 (4th Cir. 1967); *NLRB* v *Zayre Corp.*, 424 F2d 1159 (5th Cir. 1970); *Emerald Maintenance, Inc.* v *NLRB*, 464 F2d 698 (5th Cir. 1972); *NLRB* v *Wayne Convalescent Center, Inc.*, 465 F2d 1039 (6th Cir. 1972); *Spitzer Akron, Inc.* v *NLRB*, 470 F2d 1000 (6th Cir. 1972); vac'd and rem'd ___US___, 36 L Ed 2d 955, 93 S Ct___ (1973); *Tom-A-Hawk Transit, Inc.* v *NLRB*, 419 F2d 1025 (7th Cir. 1969); *International Union, Progressive Mine Workers of America* v *NLRB*, 319 F2d 428 (7th Cir. 1963); rev'd on other grounds, 375 US 396, 11 L Ed 2d 412, 84 S Ct 453 (1964); *United States Gypsum Co.* v *NLRB*, ___ F2d ___, 84 LRRM 2129 (8th Cir. 1973); *NLRB* v *Denham*, 469 F2d 239 (9th Cir. 1972); vac'd and rem'd 411 US___, 36 L Ed 2d 407, 93 S Ct 1925 (1973); *NLRB* v *Geronimo Service Co.*, 467 F2d 903 (10th Cir. 1972); *Ranch-Way Inc.* v *NLRB*, 445 F2d 625 (10th Cir. 1971); vac'd and rem'd 406 US 940, 32 L Ed 2d 328, 92 S Ct 2037 (1972); 203 NLRB No. 118 (1973)

trine adopted and applied by the NLRB. Although the NLRB generally considers factors other than employee complement in successorship cases, *in practice* its decisions are controlled by whether the new employer had hired a majority of employees,[20] unless there has been a discriminatory refusal to hire.[21] There are only two exceptions to this proposition, neither of which detracts from its validity. In *John Stepp's Friendly Ford*, 141 NLRB 1965 (1963), the NLRB was promptly reversed by the Ninth Circuit because the new employer did not take a majority of the former

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[20] *Bachrodt Chevrolet Co.*, 186 NLRB No. 151 (1970); enforced in part 468 F2d 963 (7th Cir. 1972); vac'd & rem'd 411 US ___, 36 L Ed 2d 304, 93 S Ct 1547 (1973); 205 NLRB No. 122 (1973); *Ranch-Way Inc.*, 183 NLRB No. 116 (1970); enforced 445 F2d 625 (10th Cir. 1971); vac'd & rem'd 406 US 940, 32 L Ed 2d 328, 92 S Ct 2037 (1972); 203 NLRB No. 118 (1973); *B & W Maintenance Service*, 203 NLRB No. 101 (1973); *Eklund's Sweden House Inn*, 203 NLRB No. 56 (1973); *Good Foods Manufacturing and Processing Corp.*, 195 NLRB No. 83 (1972); reconsidered 200 NLRB No. 86 (1972); *S - H Food Service, Inc.*, 183 NLRB No. 124 (1970); reconsidered 199 NLRB No. 4 (1972); *Hecker Machine, Inc.*, 198 NLRB No. 161 (1972); *Howard Johnson Co.*, 198 NLRB No. 98 (1972); *Alliance Industries, Inc.*, 198 NLRB No. 97 (1972); *Milwaukee Engine & Equipment Corp.*, 198 NLRB No. 56 (1972); *C. G. Conn. Ltd.*, 197 NLRB No. 84 (1972); enforced 474 F2d 1344 (5th Cir. 1973); *Westgate Corp.*, 196 NLRB No. 54 (1972); *Penn Bldg. Maintenance Corp.*, 195 NLRB No. 29 (1972); *Spitzer Akron, Inc.*, 195 NLRB No. 24 (1972); enforced 470 F2d 1000 (6th Cir. 1972); vac'd & rem'd ___ US ___, 36 L Ed 2d 955, 93 S Ct ___ (1973); *Eastland Lanes*, 194 NLRB No. 149 (1972); *Spruce Up Corp.*, 194 NLRB No. 145 (1972); *G. T. & E. Data Services Corp.*, 194 NLRB No. 102 (1971); *Geronimo Service Co.*, 191 NLRB No. 88 (1971); enforced 467 F2d 903 (10th Cir. 1972); *Columbia Marine Service, Inc.*, 191 NLRB No. 20 (1971); *Emerald Maintenance, Inc.*, 188 NLRB No. 139 (1971); enforced in part 464 F2d 698 (5th Cir. 1972); *Denham Co.*, 187 NLRB No. 53 (1970); modified 469 F2d 239 (9th Cir. 1972); vac'd & rem'd 411 US ___, 36 L Ed 2d 407, 93 S Ct ___ (1973); *Marion Simcox*, 178 NLRB No. 85 (1969); *Michaud Bus Lines, Inc.*, 171 NLRB No. 21 (1968); *S.S. Kresge Co.*, 169 NLRB No. 61 (1968); *Ugite Gas Inc.*, 126 NLRB No. 65 (1960); *Brockelman Bros.*, 122 NLRB No. 104 (1959).

[21] *Foodway of El Paso*, 201 NLRB No. 140 (1970); *Servico*, 191 NLRB No. 125 (1971); *Traginew Inc.*, 185 NLRB No. 132 (1970); modified 470 F2d 669 (9th Cir. 1972).

employer's employees.[22] As indicated above, the NLRB has subsequently cited with approval the Ninth Circuit's decision. The only other case in which the NLRB found successorship without the requisite majority of employees is *Firchau Logging Co.*, 126 NLRB No. 149 (1960). *Firchau* was decided prior to *NLRB* v *John Stepp's Friendly Ford, Inc.* and, therefore, does not constitute viable authority. Moreover, it should be noted that even though a majority of the new labor work force was not employed by the predecessor, the union claimed it had authorization cards signed by a majority of employees in the new work force.

To underscore the importance of the NLRB's majority test, the NLRB has on several occasions refused to find successorship when such a majority was not present although most of the other criteria enunciated by the Board were present.[23] Of these cases, *Builders Realty & Mortgage Co., Inc. d/b/a Ramada Inn*, 186 NLRB No. 87 (1970), is worthy of particular consideration in light of the similarity between that fact situation and the instant case. In *Builders Realty*, the NLRB held that an employer, which reopened a restaurant abandoned by another company to which it previously had leased the restaurant, did not violate Section 158(a) (5) of the Labor Management Relations Action when it refused to bargain with the union representing the former owner's employees. The NLRB made this determination even though following the reopening the new employer operated the restaurant at the same location with the same fixtures and equipment, served the same type of food and beverages in essentially the same way,

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[22] *NLRB* v *John Stepp's Friendly Ford, Inc.*, 338 F2d 833 (9th Cir. 1964).

[23] See, e.g., *Dorrance J. Benzchawel, d/b/a Parkwood IGA*, 201 NLRB No. 141 (1973); *Crotona Service Corp.*, 200 NLRB No. 97 (1972); *Triangle Maintenance Corp.*, 194 NLRB No. 85 (1971); *Southline System Services, Inc.*, 198 NLRB No. 71 (1972); *Builders Realty & Mortgage Co., Inc. d/b/a Ramada Inn*, 186 NLRB No. 87 (1970); *Tallakson Ford, Inc.*, 171 NLRB No. 67 (1968); *Thomas Cadillac, Inc.*, 170 NLRB No. 92 (1968), aff'd 414 F2d 1135 (D.C. Cir. 1969); *Federal Electric Corp.*, 167 NLRB No. 63 (1968); *Triumph Sales, Inc.*, 154 NLRB No. 71 (1965).

operated under the same franchise and employed essentially the same classifications of employees. The NLRB found no successorship since it appeared that a majority of the other company's employees were not hired by the new employer as part of its regular and expanded work force, and that the employer's failure to hire a majority of the other company's employees was not due to discriminatory reasons.

Clearly this Court in *Textile Workers Union* v *Lincoln Mills, supra,* foreclosed the development of two different federal interpretations of federal law and provided that the federal substantive law to be applied is to be uniform and in the first instance based on the law as developed under the Labor Management Relations Act. The NLRB, exercising its authority under that Act, has enunciated controlling federal substantive law on the issue of successorship. Yet, as a review of the NLRB's decisions clearly indicates, the Sixth Circuit has abandoned that law, "at least in this § 301 action,"[24] and finds successorship where in fact under NLRB decisions successorship would not exist. Such a dichotomy cannot be permitted to exist in federal labor law.[25]

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[24] Appx A, p. 7a. This comment by the Sixth Circuit certainly indicates that it would apply different standards per successorship if the instant case were on review from a decision of the NLRB rather than on review from the District Court. It is precisely this newly-created practice of applying different standards to exactly the same case depending upon choice of forum which the Petitioner strongly urges requires this Court to grant this Petition. Choice of forum simply cannot be allowed to result in parallel bodies of federal labor law at odds with each other.

[25] See *Local 174, Teamsters Union* v *Lucas Flour Co.*, 369 US 95, 7 L Ed 2d 593, 82 S Ct 571 (1961); *San Diego Bldg. Trades Council* v *Garmon*, 359 US 236, 3 L Ed 2d 775, 79 S Ct 773 (1959).

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that a Writ of Certiorari should be granted.

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APPENDIX A

No. 72-2009

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Detroit Local Joint Executive Board, Hotel and Restaurant Employes and Bartenders International Union, AFL-CIO, ***Plaintiff-Appellee,*** **v.** **Howard Johnson Company, Inc.,** ***Defendant-Appellant.***	**Appeal from the United States District Court for the Eastern District of Michigan**

Decided and Filed July 12, 1973.

Before: Phillips, Chief Judge, Celebrezze and Miller, Circuit Judges.

Miller, Circuit Judge. The Plaintiff, Detroit Local Executive Board, filed this action under §301 of the Labor Management Relations Act, 29 U.S.C. §185,[1] seeking to require the defendant, Howard Johnson Company, Inc., to arbitrate grievances that arose during its take-over of a motel and restaurant formerly owned by P.L. Grissom & Son, Inc., and the Belleville Restaurant Company.

On December 7, 1959, the defendant and P.L. Grissom & Son, Inc., entered into a license agreement providing for the operation of a "Howard Johnson Motor Lodge" in Belleville, Michigan. On August 18, 1960, the defendant entered into an operator's agreement with Ben Bibb, P.L. Grissom, and the Belleville Restaurant Company for the operation of a "Howard Johnson's Restaurant" adjacent to the motor lodge. On January 1, 1968, the Belleville Restaurant Company and the Hotel & Restaurant Employees

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[1] Section 301 of the L.M.R.A., 29 U.S.C. §185, provides for action in federal courts by either party to enforce the provisions of a collective bargaining agreement.

& Bartenders International Union entered into a collective bargaining contract affecting the restaurant employees. On August 1, 1968, P.L. Grissom & Son, Inc., the operator of the motor lodge, entered into a collective bargaining agreement with the Hotel, Motel and Restaurant Employees Union, Local 705, concerning the motel employees. On June 16, 1972, P.L. Grissom & Son, Inc., Charles Grissom, and the Belleville Restaurant Company[2] sold their interest in the motor lodge and the restaurant to the Howard Johnson Company, Inc. Pursuant to an oral agreement, the transfer date was set for July 24, 1972. On June 28, 1972, Howard Johnson notified Grissoms that it would not recognize or assume any labor agreements entered into by these companies. Also Howard Johnson would not assume any obligations or liabilities of the companies resulting from any labor agreements or from unfair labor practices. On July 9, 1972, Grissoms gave notice to their employees that their employment would be terminated at midnight July 23, 1972. On July 13, 1972, registered mail notices were sent to the union[3] notifying it of the termination of the business. Howard Johnson began interviewing prospective employees on July 10, 1972, and the first employees were hired on July 18, 1972. When Howard Johnson took over the operation of the motel and restaurant, it retained only nine of the restaurant's employees and only one of the motels employees. At least 40 employees were permanently replaced.

On July 21, 1972, the plaintiff union instituted this action in state court and obtained a temporary injunction prohibiting Howard Johnson from locking out or terminating the employment of the 40 employees. The company did not honor the injunction, claiming that it did not receive adequate service and notice. A hearing was held at the state court level at which the injunction was dissolved, pending a further pretrial hearing. The defendant filed a petition for removal and the state court pretrial hearing as such was never held. A hearing was held in federal district court on August 7, 1972, at which time the parties orally agreed on a stip-

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[2] For convenience the prior owners of both the restaurant and the motor lodge will hereafter be referred to as the Grissoms.

[3] While the unions named in the two agreements bear distinct names they are apparently identical in interest and governance and will be referred to herein and considered as one.

ulation of facts. On August 22, 1972, the district court entered its memorandum, finding for the plaintiff.[4] Notice of appeal was duly filed and the district court granted a stay pending appeal.

The collective bargaining agreement in effect between the motor lodge and the union contained the usual arbitration provisions. The grievance procedures were in four steps, the fourth step being submission of the grievance to an arbitrator.[5] The arbitration provision provided:

> **Section 2.** An arbitrator shall not have any right or authority to add to, substract from or modify the terms and provisions of this Agreement. Further, the renewal, extension, modification or amendment of this Agreement shall not be subject matter of any grievance or arbitration procedure.

The agreement also provided:

> "This Agreement shall be binding upon the successors, assigns, purchasers, lessees or transferees of the Employer whether such succession, assignment or transfer be effected voluntarily or by operation of law or by merger or consolidation with another company provided the establishment remains in the same line of business."

Apparently neither agreement[6] attempted to delineate specifically which types of disputes were arbitrable.

The district court examined in close detail the two leading cases of the Supreme Court applicable to this action, *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964) and *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972). The district court concluded that *Wiley* was more in point than *Burns* and

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[4] The Grissoms apparently have expressed their willingness to settle or arbitrate any liability they might have under the collective bargaining agreements.

[5] The collective bargaining agreement between the restaurant and the union contained a similar grievance procedure, but only in three steps.

[6] The restaurant-union agreement although it contained an arbitration clause did not include either of the above-quoted provisions.

consequently that the defendant should be required to arbitrate.[7] This finding was premised on the conclusion that Howard Johnson was a successor employer, and therefore, under *Wiley* should be required to honor the arbitration clause of the Grissoms' collective bargaining agreements with the union. The district court left to the arbitrator the decision as to which provisions of the agreements should be applicable to Howard Johnson.

The first question we must face is whether Howard Johnson is a successor employer. The Court in *Wiley* said:

> We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives. As indicated above, there may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved. 376 U.S. at 551.

In *Burns* the Court cited with approval a number of court decisions enforcing orders of the NLRB delineating a number of factors to consider in determining whether there is a "continuity of interest" so that the purchaser of a business is a successor. These factors include: the prior and subsequent structure of the business operation, *NLRB* v. *Zayre Corp.*, 424 F.2d 1159, 1163 (5th Cir. 1970); *S. S. Kresge Co.* v. *NLRB*, 416 F.2d 1225 (6th Cir. 1969), the location of the operation, *NLRB* v. *Zayre, supra; S. S. Kresge* v. *NLRB,supra; NLRB* v. *McFarland*, 306 F.2d 219 (10th Cir. 1962), and the identity of the employees and the nature of the work, *NLRB* v. *Zayre, supra, Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F.2d 1025 (7th Cir. 1969).[8]

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[7] In *Wiley* the Court required the surviving corporation, after a merger, to arbitrate grievances under the arbitration provisions contained in the collective bargaining agreement negotiated by the union with the displaced corporation.

In *Burns* the Court held that a successor although required to bargain with the union if it retained a majority of the predecessor's employees, need not honor the previously negotiated collective bargaining agreement. (emphasis added)

[8] This list of considerations is not intended to be exhaustive. Since each case must be considered on its own facts, other factors could be considered in appropriate circumstances.

Howard Johnson argues that the controlling factor in all successorship cases is whether the new owner hired a majority of the old owner's employees. For support it points to the Court's language in *Burns*.

> It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an "unusual circumstance" as to affect the force of the Board's certification within the normal operative period *if a majority of employees after the change of ownership or management were employed by the preceding employer.* 406 U.S. at 279 (emphasis added).

Also:

> But where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of §8(a) (5) and §9(a) by ordering the employer to bargain with the incumbent union. 406 U.S. at 281.

Moreover, Howard Johnson points to this court's decisions in *NLRB* v. *Interstate 65 Corp.*, 453 F.2d 269 (6th Cir. 1971) and *NLRB* v. *Wayne Convalescent Home*, 465 F.2d 1039 (6th Cir. 1972). Both of these decisions placed great reliance on the hiring of enough of the predecessor's employees to constitute a majority of the successor's work force in finding successorship status. On the other hand, the absence of the hiring of a majority of the predecessor's employees may lead to the refusal to find successorship status. *See NLRB* v. *John Stepp's Friendly Ford, Inc.*, 338 F.2d 833 (9th Cir. 1964). Apparently the same considerations apply to actions under §301 of the LMRA. In *Wackenhut Corp.* v. *International Union, United Plant Guards*, 332 F.2d 954 (9th Cir. 1964), the Ninth Circuit placed major reliance on the hiring of substantially all of the predecessor's employees to find successorship status. The Court there also followed *Wiley* and required the successor employer to abide by the substantive terms of the collective bargaining agreements as determined by an arbitrator. In *Printing Specialties & Paper Products Union* v. *Pride Papers Aaronson Bros. Paper Corp.*, 445 F.2d 361 (2nd Cir. 1971), the Second Circuit

regused to find successorship in an action under §301. The Court stated: "The fact that no [predecessor's] employees worked at the new enterprise is most compelling evidence of lack of substantial continuity in the business enterprise." 445 F.2d at 363-4. Only one case has been brought to our attention finding successorship in a §301 action where the successor did not hire a majority of the predecessor's employees. In *Monroe Sanders Corp.* v. *Livingston*, 377 F.2d 6 (2nd Cir. 1967), the Second Circuit held that where a parent company terminated the employees of a subsidiary in order to continue the same functions at a newly purchased operation, the parent could be required to arbitrate, as a successor, the termination of the subsidiary's employees.

In the case before us, the district court held that although Howard Johnson did not hire a majority of Grissoms' employees, it could nevertheless be required to arbitrate as a successor. The court found considerable continuity of interest between the new and old business. It pointed out that substantially all of the assets of Grissoms were purchased, that the location and identity of the businesses remained exactly the same, that there was only a one minute hiatus in the operation of the enterprises at the time of the transfer, and that many of the products and services were identical. Relying on these factors the district court viewed Howard Johnson as a successor. We agree with this conclusion.

In addition to the criteria relied upon by the district court, the franchising agreements between Grissoms and Howard Johnson included extensive reservations by Howard Johnson over the operation of the motel and the restaurant, evidencing the close control it possessed over the management and activities of both operations. Also the motel bargaining agreement itself contained a successorship clause.[9]

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[9] This clause does not indicate an intention on the part of Howard Johnson to be bound by the collective bargaining agreement since it was not a party to the agreement, but it does indicate the intention of the union to have the collective bargaining agreement continue in effect after a change in ownership.

Furthermore, we do not deem the refusal to hire a majority of Grissoms' employees to preclude the finding of successorship, at least in this §301 action. Howard Johnson's argument here attempts to pull itself up by its own bootstraps. It argues that it need not arbitrate the refusal to hire Grissoms' employees because it is not a successor. It is not a successor, because it did not hire a majority of Grissoms' employees. Also to adopt the position urged by Howard Johnson would make the employees' jobs completely contingent on the employer's desire either to retain or to disregard the collective bargaining agreements. If Howard Johnson sought to retain the agreement negotiated by Grissoms, it would hire a majority of Grissoms' employees. If, on the other hand, it wished to disregard the collective bargaining agreement, it would simply hire none or at best only a few of the former employees. The decision whether to hire the predecessor's employees should turn upon other and more relevant considerations.[10]

Since we determine that Howard Johnson is a successor employer, we must decide whether such status carries with it the obligation to arbitrate under the collective bargaining agreements. In *Wiley* the Supreme Court held that collective bargaining agreements under federal labor law must be interpreted differently than other contracts as construed under common law principles. Accordingly, the Court held that the arbitration provisions are binding on a successor employer even though it was not a party to the collective bargaining agreement. Following *Wiley* several circuits have held that a successor employer in §301 actions could be bound by the substantive terms of the previously negotiated collective bargaining agreement if appropriate under the arbitrator's award. *See e.g., Wackenhut Corp.* v. *International Union, United*

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[10] Howard Johnson also argues that since this was a purchase and sale of assets, it is not a successor as it did not by operation of state law assume any of the obligations of the agreements. In *Wiley*, the transaction was a merger in which the surviving corporation is liable for the debts of the disappearing corporation. This distinction has been consistently rejected in §301 actions. *United States Gypsum Co.* v. *United Steelworkers of America*, 384 F.2d 38 (5th Cir. 1967); *United Steelworkers of America* v. *Reliance Universal Inc.*, 335 F.2d 891 (3rd Cir. 1964); *Wackenhut Corp.* v. *International Union, United Plant Guards*, 332 F.2d 954 (9th Cir. 1964).

Plant Guards, supra; United States Gypsum Co. v. *United Steelworkers of America*, 384 F.2d 38 (5th Cir. 1967); *Monroe Sanders Corp.* v. *Livingston, supra.*

Howard Johnson, however, argues that the Supreme Court's decision in *Burns* that a successor employer does not violate §8(a)(5) when it refuses to honor any of the substantive terms of the predecessor's collective bargaining agreement, also precludes an arbitrator from requiring a successor to honor any of the terms of the previous agreement. We do not feel that *Burns* requires such a result.

In *Wiley* the Court stated:

> that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees claims continue to be resolved by arbitration rather than by "the relative strength ... of the contending forces." *Warrior & Gulf, supra*, at 580. 376 U.S. at 549.

Nothing in *Burns* in our opinion alters this reflection of national policy. It is true that in *Burns* the Court said:

> A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to

the relative economic strength of the parties. 406 U.S. at 287-288.

Furthermore, the Court criticized the Board's position that the successor is bound by all the terms of the collective bargaining agreement. It said:

> The Board's position would also raise new problems, for the successor employer would be circumscribed in exactly the same way as the predecessor under the collective-bargaining contract. It would seemingly follow that employees of the predecessor would be deemed employees of the successor, dischargeable only in accordance with provisions of the contracts and subject to the grievance and arbitration provisions thereof. Burns would not have been free to replace Wackenhut's guards with its own except as the contract permitted. Given the continuity of employment relationship, the pre-existing contract's provisions with respect to wages, seniority rights, vacation privileges, pension and retirement fund benefits, job security provisions, work assignments and the like would devolve on the successor. 406 U.S. at 288-89 (footnotes omitted).

At first glance this language appears to cast doubts on the continued validity of *Wiley*. We do not feel, however, that the Court intended to eviscerate *Wiley*. The two cases are not irreconcilable. In *Burns* the Supreme Court distinguished *Wiley* on three grounds. First, the Court noted that *Wiley* arose in the context of a Sec. 301 action for arbitration, while *Burns* arose in the context of a Sec. 8(a)(5) proceeding where the National Labor Relations Board is "expressly limited by the provisions of Sec. 8(d)."[11] 406 U.S. at 285. Second, the Court noted that *Wiley* was limited to an arbitration order while in *Burns* the Board found the company in violation of Sec. 8(a)(5) for refusing to bargain with the union in not honoring the substantive provisions of the collective bargaining agreement. Third, *Wiley* involved a merger occurring

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APPENDIX A footnotes

[11] Section 8(d), 29 U.S.C. Sec. 158(d), as interpreted by the Supreme Court in *H. K. Porter* v. *NLRB*, 397 U.S. 99 (1970) prohibits the NLRB from ordering a party to accede to a demand to incorporate a specific provision into a collective bargaining agreement.

against the background of state law, while in *Burns* the two companies were competitors and had no prior dealings.

The first and second distinctions presented by the Court are convincting that *Burns* does not preclude arbitration in the situation before us. Traditionally, arbitrators have been accorded wide flexibility in interpreting collective bargaining agreements. In *Wiley* the Court's limited holding was that the successor employer was under a duty to arbitrate grievances, the scope and extent of the duty being governed by the collective bargaining agreement. The Court avoided any expression of views as to the merits of the substantive matters of arbitration. Since *Wiley* arbitration awards have taken into account altered conditions created by a change of employers, although of course the arbitrator's authority must come from the collective bargaining agreement itself. As stated by the Third Circuit in *United Steelworkers of America* v. *Reliance Universal, Inc.*, 335 F.2d 891, 895 (3rd Cir. 1964):

> In any event, we find implicit in the guarded language of the Wiley opinion, recognition and concern that new circumstances created by the acquisition of a business by a new owner may make it unreasonable or inequitable to require labor or management to adhere to particular terms of a collective bargaining agreement previously negotiated by a different party in different circumstances. Although the pre-existing labor contract indicates the structure of labor relations and the established practice of the shop at the beginning of the new proprietorship, an arbitrator of a subsequent complaint charging unwarranted departure from that scheme may properly consider any relevant new circumstances arising out of the change of ownership, as well as the provisions of and practices under the old contract, in achieving a just and equitable settlement of the grievance at hand. The requirements of the contract remain basic guides to the law of the shop, but the arbitrator may find that equities inherent in changed circumstances require an award in a particular controversy at variance with some term or terms of that contract.

The NLRB in its Burns decision had adopted an all-or-nothing approach. If the employer was a successor then it was

required to honor *all* of the terms of the predecessor's agreement. If not a successor, it did not have to honor any part of the predecessor's agreement. *Burns Int'l. Services, Inc.*, 182 NLRB 348 (1970). Apparently the Board felt that it was barred from taking a middle ground by requiring the successor to honor selective portions of the agreement by the Supreme Court's ruling in *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970). As noted by the Supreme Court in *Burns* the Board's position would lead to rigidity in labor relations. This factor we feel is primarily the Supreme Court's reason for rejection of the Board's position.[12] In arbitration proceedings as ordered below such rigidity is not present.

Also we feel that our holding is in accordance with the national policy of the settlement of labor disputes by arbitration rather than by a contest of strength between the parties. *See, United Steel Workers of America* v. *America Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). We do not feel that such a role was vitiated by *Burns*.[13]

Finally, we must note that nothing in our opinion should be taken as an expression on the merits of the respective complaints before the arbitrator. As stated by the Fifth Circuit in *International Ass'n of Machinists* v. *Hayes Corp.*, 296 F.2d 238, 244 (5th Cir. 1961):

> We make doubly plain that this opinion in no way indicates what, if any, decision an arbitrator should or must

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[12] Even before the Supreme Court's ruling in *Burns* the National Labor Relations Board had retreated from this approach and found that "unusual circumstances" will present the imposition of the entire collective bargaining agreement where it would lead to inequitable results. *Emerald Maintenance Inc.*, 188 NLRB No. 139 (1971).

[13] The plaintiff suggests that the approach adopted in this case will make the employees' and the employer's rights contingent on the choice of forum. We do not disagree with this characterization, but feel that it follows from the first ground on which *Burns* distinguished *Wiley* – that the NLRB is expressly limited by Sec. 8(d) of the Act while an arbitrator is under no such restriction.

make. We hold merely that he should determine the grievance. Whether the decision or the remedy prescribed is, or is not, supportable is for another day.

In accordance with the foregoing the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, ***Plaintiffs,*** **vs. Howard Johnson Company, Inc., a Maryland corporation; Howard Johnson Motor Lodge, Inc., a Michigan corporation; and Belleville Restaurant Company, Inc., a Michigan corporation,** ***Defendants.***	**Civil Action No. 38654**

MEMORANDUM OPINION

Plaintiff union instituted suit in the Circuit Court of the 3rd Judicial Circuit of Michigan (Wayne County) for the purpose of obtaining an order of that court compelling the defendants to arbitrate under Section 301 of the National Labor Relations Act (29 U.S.C. § 185 (1970)) and for a mandatory injunction requiring defendants to rehire or reinstate certain members of plaintiff union previously employed at Howard Johnson Motor Lodge and the Belleville Restaurant located in Belleville, Michigan.

The parties hereto have stipulated to all facts pertinent to a decision on the merits and have jointly requested that, there being no dispute as to any material fact, the Court decide the issues presented. The stipulation of facts was placed on the record and is incorporated by reference herein in its entirety. For the purposes of clarity and continuity, a resume of those facts is set forth below in narrative form.

The Howard Johnson Motor Lodge and the Belleville Restaurant were owned and operated by two corporations controlled by

the Grissom family (hereinafter referred to as Grissom). Grissom operated these businesses under franchising agreements entered into with Howard Johnson Company, Inc., a Maryland corporation (hereinafter referred to as the Company), on December 12, 1959 and August 18, 1960.

The 1959 "License Agreement" involves the franchising of the Howard Johnson Motor Lodge and is a strikingly comprehensive and stringently controlling document; for example, the Agreement provides that the Company shall determine and approve standards of construction, operation and service; that Company supervisory shall have the right to enter the premises at any reasonable time for that purpose; that approval must be obtained for furniture, utensils, stationery, supplies, etc., bearing the "Howard Johnson" trade name; that repairs and painting will be done at the reasonable behest of the Company; that the licensee will not seek to employ any persons employed by another franchisee; that certain insurance is to be carried; that the licensee give the Company the first option to purchase in the event of a contemplated sale and in the event the Company declines to purchase, the successor must be approved by the Company.

The restaurant "Operator's Agreement" is of identical import with the added feature of the requirement that the franchisee purchase from the Company all supplies or products manufactured or sold by the Company which the franchisee may need for use or sale at the restaurant.

In pursuance of said agreements, Grissom operated the Motor Lodge and Restaurant and entered into collective bargaining agreements (Exhibits A, B & C attached to complaint) with the plaintiff union as the certified representative of employees at both businesses. These agreements provide, among other things, that grievances shall be resolved by Arbitration (Exhibit A, Article IX, Exhibit B, Article III) and that the agreements shall be binding upon the "successors, assigns, purchasers, or transferees" of Grissom (Exhibit A, Article XVIII, as to Motor Lodge employees.)

Subsequently, Grissom entered into negotiations for the sale, transfer and lease of its holdings in the two businesses to the Howard Johnson Company and on June 16, 1972, an Agreement

was executed by the respective parties which called for an effective cessation date and time of July 23, 1972, at 11:59 P.M. That is, that the Company would assume the operation of both businesses pursuant to the Agreement, as of 12:01 A.M., July 24, 1972.

On June 28, 1972, the Company mailed to Grissom an amenatory letter which provided that the Company would not recognize and assume any labor agreements then extant. Grissom signed an acknowledgement and confirmation on July 11, 1972.

On July 9, 1972, Notices to Employees of both businesses were posted advising of the termination of employment as of Midnight, July 23, 1972. Some personal contact between the Company and the Union commenced on July 11, 1972. On July 13, 1972, registered mail notices were sent to plaintiff union advising of the termination of business by Grissom at the aforesaid date and time.

The Company began interviewing prospective employees on July 10, 1972, and hired the first employee on July 18, 1972. It commenced training of employees on July 20, 1972, at another location.

The Company commenced operation at both businesses at 12:01 A.M., July 24, 1972 with 55 employees; of those 33 were engaged in the Restaurant and 9 of them were former Grissom employees. None of the supervisory personnel of Grissom were retained by the Company. The number employed by Grissom at the time of the changeover was 53.

On the afternoon of Friday, July 21, 1972, plaintiff union instituted this lawsuit in the State court and obtained an order which enjoined the defendants from locking out or terminating the employment of the 53 Grissom employees. Defendants did not honor the injunction, claiming that appropriate notice and service was not made.

On July 24, 1972, a hearing was held before the Honorable Blair Moody, Jr., Circuit Judge for Wayne County, and Judge Moody dissolved the injunction pending a pre-trial hearing to be held on July 28, 1972.

On July 26, 1972, defendants filed a Petition for Removal to this Court and the July 28, 1972 pre-trial hearing was not held per se, but a transcript of the proceedings at that time has been submitted.

As has been indicated, the above represents only a resume of material facts since it is not necessary, in view of the stipulation of the parties to enumerate the salient facts in detail.

Defendants Grissom have stipulated and agreed to arbitrate in accordance with the terms of the collective bargaining agreement and are not, therefore, indispensably involved in the issues now presented.

These issues are as follows:

1. Should the Howard Johnson Company be compelled to arbitrate under the provisions of the collective bargaining agreement entered into between Grissom and the plaintiff union?

2. Should a preliminary injunction issue requiring that the Howard Johnson Company rehire all of the former Grissom employees forthwith?

3. Should this Court remand the proceeding to the State Court.

It is, of course, obvious that decision of this issue must rest on the understanding and applications of the principles and directions of two key cases: *John Wiley & Sons* v. *Livingston* 376 U.S. 543 (1964) and *NLRB* v. *Burns International Security Services, Inc.*, 40 U.S.L.W. 4499 (U.S. May 15, 1972).

No more frequent admonition appears in the pages of appellate decisions then that each case must be determined on the facts and circumstances peculiar to it. This prompts a thorough analysis of the factual situations in *Wiley* and *Burns.*

Wiley was, in the first instance, a Section 301 case wherein the union sought to compel the Wiley company to arbitrate. It contained these significant features: Interscience Publishers, a smaller firm, merged with and into Wiley, another publishing firm.

Interscience had a current collective bargaining agreement containing an arbitration clause with the union. Wiley's employees were not represented by any union. There was no express provision in the Interscience-Union agreement making the agreement binding on the successors of Interscience. Most of the Interscience employees were retained by the merged corporation.

In *Wiley*, the Supreme Court, through Mr. Justice Harlan, framed the issue, thusly:

> "Here, the question is whether Wiley, which did not itself sign the collective bargaining agreement on which the Union's claim to arbitration depends, is bound at all by the agreement's arbitration provision."

The Court then held as follows:

> "We hold that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not *automatically* terminate all rights of the employees covered by the agreement, and that, in *appropriate circumstances, present here*, the successor employer may be required to arbitrate with the union under the agreement." (376 U.S. at 548) (Emphases added.)

The "appropriate circumstances" mentioned by the Court must entail the factors set forth above with the added feature of the Court's reference to the general rule in corporation law relating to the survival of debts in merger cases (pg. 550 n. 3) and the references to Section 90 of the New York Stock Corporation Law (pg. 547-548).

The pervading principle enunciated by the Court and applied to those facts is contained succinctly in the following language:

> "It would derogate from 'the federal policy of settling labor disputes by arbitration,' *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596, if a change in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established; this is so as much in cases like the present, where the contracting employer disappears into

another by merger, as in those in which one owner replaces another but the business entity remains the same." 376 U.S. at 549.

The parameters of the *Wiley* case are somewhat defined in *Burns* and an analysis of *Burns* is essential here.

Wackenhut provided protection services at a Lockheed plant and its employees were represented by a union which had negotiated a collective bargaining agreement with Wackenhut. However, *Burns* underbid Wachenhut for the protection services contract and employed 42 guards for that purpose, 27 of them having been previously employed by Wackenhut. Burns did not purchase any assets of Wackenhut? as a matter of fact, Burns had no dealing with Wackenhut whatsoever.

The N.L.R.B. found that Burns violated §§8(a)(5) and 8(a)(1) of the National Labor Relations Act by failing to recognize and bargain with the union and by refusing to honor the collective bargaining agreement, and ordered Burns to abide by the terms of that agreement. The Supreme Court held that under "the precise facts" therein involved, the N.L.R.B. erred in requiring Burns to honor the terms of the collective bargaining agreement but not in its order that Burns bargain with the union.

The Court's holding is couched thusly:

"... But where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of §8(a)(5) and §9(a) by ordering the employer to *bargain* with the incumbent union ..."

"... It does not follow, however, from Burns' duty to bargain that it was bound to observe the substantive terms of the collective-bargaining contract the union had negotiated with Wackenhut and *to which Burns had in no way agreed.*" 40 U.S.L.W. 4502. (emphasis supplied.)

The Court then goes on to cite the misapplication by the Board of the *Wiley* case to the *Burns* factual situation:

"We do not find *Wiley* controlling in the circumstances here. *Wiley* arose in the context of a § 301 suit to compel arbitration, not in the context of an unfair labor practice proceeding where the Board is expressly limited by the provisions of § 8(d). That decision emphasized 'the preference of national labor policy for arbitration as a substitute for tests of strength before contending forces' and held only that the agreement to arbitrate, 'construed in the context of national labor law,' survived the merger and *left to arbitration, subject to judicial review, the utlimate question of the extent to which, if any, the surviving company was bound by other provisions of the contract . . .*" 40 U.S.L.W. 4503. (emphasis supplied.)

Further distinguishing *Burns* from *Wiley* the Court said:

" . . . The present case does not involve a § 301 suit; nor does it involve the duty to arbitrate . . . *Wiley* suggests no such open-ended obligation. Its narrower holding dealt with a merger occurring against a background of state law which embodies the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation . . ." 40 U.S.L.W. at 4503.

The concurring and dissenting opinion authored by Mr. Justice Rehnquist (joined by the Chief Justice, Justice Brennan and Justice Powell) provides further insight particularly with respect to the doctrine of "successorship" and its *Wiley* application. Particularly pertinent here is the following:

"*Wiley, supra,* speaks in terms of change in the 'ownership or structure of an enterprise' as bringing into play the obligation of the successor employer to perform an obligation voluntarily undertaken by the predecessor employer. But while the principle enumerated in *Wiley* is by no means limited to the corporate merger situation there, it cannot logically be extended to a mere naked shifting of a group of employees from one employer to another without totalling [sic] disregarding the basis for the doctrine . . ."

"Phrased another way, the doctrine of successorship in the federal common law of labor relations accords to employees

> the same general protection against transfer of assets by an entity against which they have a claim as is accorded by other legal doctrines to non labor-related claimants against the same entity. Non labor-related claimants in such transfer situations may be protected not only by assumption agreements resulting from the self-interest of the contracting parties participating in a merger or sale of assets but by state laws imposing upon the successor corporation any merger the obligations of the merged corporation (see e.g., § 90 of the New York Stock Corporation Law, cited in *Wiley, supra),* and by bulk sales acts found in numerous states. Those latter are designed to give the non labor-related creditor of the predecessor entity some claim, either as a matter of contract right against the successor, or as a matter of property right to charge the assets which pass from the predecessor to the successor. The implication of *Wiley* is that the federal common law of labor relations accords the same general type and degree of protection to employees claiming under a collective-bargaining contract." 40 U.S.L.W. at 4509.

The foregoing analysis, with the particular emphasis on the respective factual situations and the distinctions drawn between *Wiley* and *Burns,* leads this Court to the conclusion that the case at bar more closely approximates *Wiley* than *Burns* and that *Wiley* controls.

Certainly there is no *merger* in this case, but *Wiley* although dealing with a merger case did not limit the application of the successor doctrine to mergers:

> ". . . [T]his is so as much in cases like the present . . . as in those in which one owner replaces another but the business entity remains the same." 376 U.S. at 549.

Moreover, in this case, there is not the usual "arms length, willing seller, willing buyer" situation but one involve the take-over by a franchiser under licensing and operating agreements that evidence a control of large and invidious proportions.

Also in *Wiley* (as underlined by *Burns)* there was a state law background regarding merged corporations and a successor's

responsibility not unlike the Michigan background in respect to successor's obligations (MCLA Sec. 440.6101 - 440.6111 (1967). These provisions replaced MCLA 442.1 - 442.53 (1961)). Here, too, there is not only the purchase of assets, but in addition, the assumpation of certain outstanding contracts of Grissom (Page 9, Section XV of Sales Agreement).

Perhaps most importantly is the collective bargaining agreement itself (Exhibit A relating to Lodge employees) which specially contemplates that successors are bound by its terms. (See *Ranch-Way, Inc.* v. *NLRB*, 445 F.2d 625 (10th Cir. 1971); *International Association* v. *Northeast Airlines, Inc.*, 337 F. Supp. 499, 504 (D. Mass. 1972)). That the Company had notice of that agreement is obvious from its aforementioned addendum or modification of the Sales Agreement evidenced by the letter of June 28, 1972, which specifically repudiated any "labor agreements" then in force between Grissom and any labor organization.

It would appear, then, that the principle of *Wiley* that there be a ". . . substantial continuity of identity in the business before and after the change . . ." is amply satisfied here where substantially all of the assets of Grissom were purchased, the location and identification of the business remained exactly the same, there was a one-minute hiatus in the identical operation, and where even many products sold remained the same. Joined as this "continuity of identity" is with the enumerated features above, as contrasted with the *Burns* situation, the duty to arbitrate is clear.

The scope of an order to arbitrate should, however, be clearly understood in the terms of the role of this Court and certain reservations should be articulated.

It is noted, for example, that *Wiley* involved the claims of the union on behalf of those of its members hired by the successor. In *Burns* the duty to bargain was based, in part, on the hiring by the successor of a majority of predecessors' employees but the Court refused to order the successor to honor the predecessors' contract.

Thus, in *Burns*:

"We also agree with the Court of Appeals that holding either the union or the new employer bound to the substantive

terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions which must be honored do not correspond to the relative economic strength of the parties.

"The Board's position would also raise new problems, for the successor employer would be circumscribed in exactly the same way as the predecessor under the collective-bargaining contract. It would seemingly follow that employees of the predecessor would be deemed employees of the successor, dischargeable only in accordance with provisions of the contract and subject to the grievance and arbitration provisions thereof. Burns would not have been free to replace Wackenhut's guards with its own except as the contract permitted. Given the continuity of employment relationship, the pre-existing contract's provisions with respect to wages, seniority rights, vacation privileges, pension and retirement fund benefits, job security provisions, work assignments and the like would devolve on the successor." 40 U.S.L.W. at 4505.

Thus, this order to arbitrate does not contemplate that it be tantamount to an order that the Company honor the collective bargaining agreement. Rather, it is emphasized, it is an order based on Section 301 and in conformance with the direction of *Burns* which is contained in the following language:

> "[*Wiley* held only that] the agreement to arbitrate, . . . survived the merger and left to the arbitrator, subject to judicial review, the ultimate question of the extent to which, if any, the surviving company was bound by *other provisions of the contract.*" 40 U.S.L.W. at 4503. (emphasis supplied).

This troubling issue in the case at bar is presented by virtue of the small number of employees formerly employed by Grissom and subsequently employed by the successor Company. Certainly this is an element in determing the "continuity of identity" issue. Actually, most "successor" cases involve situations where a substantial number of employees are retained by the successor. (See *Retail Clerks Union* v. *Lynn Drug Co.*., 299 F.Supp. 1036, 1039, 1040 (S.D. Ohio 1969) and cases therein cited.)

The role of the District Judges is no more clearly illustrated than in the case of *Monroe Sander Corporation* v. *Livingston*, 377 F.2nd 6 (2d Cir. 1967) with regard to this issue of the rights of terminated employees. In *Monroe Sander*, the Court ordered arbitrations ". . . of the general issue of whether the union is entitled to rights and benefits, especially jobs, . . ." in a case where none of the predecessor's employees were hired by the successor where there was a move of location. The majority opinion stressed the national labor policy favoring arbitration and the opportunity for judicial review. In his dissent, Chief Judge Lumbard found that the demands of the union regarding jobs were not arbitrable under *Wiley* precept that:

> ". . . the subject matter of the dispute must be regarded as nonarbitrable because it can be seen in advance that no award to the Union could receive judicial sanction." 377 F.2d at 14.

Thus, here, where the union, in its complaint, alleges several grievances, some having to do with claims other than job continuity; where the arbitration proceedings would permit thorough exploration of all facets; and where a number of employees represented by the union have been retained by the successor, it appears to be the better policy and the more prudent to follow strictly the *Burns'* interpretation of *Wiley* that it be left to arbitration to determine the "ultimate question of the extent to which, if any, the surviving company was bound by other provisions of the contract."

In this vein, the language of *United Steelworkers* v. *Reliance*, 335 F.2d 891, 894-5 (3rd Cir. 1964) is particularly appropriate:

> "One important matter remains. The opposing parties here have argued for and against the proposition that the collective bargaining agreement is unqualifiedly binding upon Reliance, as would have been the case if there had been assignment or novation substituting Reliance as a party to the instrument. But, in the Wiley case, the Supreme Court seems to have been careful to avoid so broad a ruling. It merely reasoned and decided that federal labor law imposed upon a succeeding proprietor a duty to arbitrate those questions which his predecessor was bound to arbitrate under his labor contract. The fact that the plant covered by the labor contract had been closed and its employees mingled with other workers with independent and perhaps different rights at another plant may well have influenced this careful limitation of the Wiley holding.
>
> "In any event, we find implicit in the guarded language of the Wiley opinion, recognition and concern that new circumstances created by the acquisition of a business by a new owner may make it unreasonable or inequitable to require labor or management to adhere to particular terms of a collective bargaining agreement previously negotiated by a different party in different circumstances."

PRELIMINARY INJUNCTION

The union also requests a preliminary injunction which would, in effect, require the Company to hire or rehire the former Grissom employees. This the Court must decline to do.

While recognizing the plight of the terminated employees, it must also consider that new employees have been hired and financial harm to them would result. Granted the terminated employees have vested interests and will not be free from temporary financial harm, restitution and reimbursement is available to them depending on the decision of the arbitrator.

Furthermore, arbitration should not be a lengthy, time-consuming process and there should be an attempt to avoid disruptive changes.

Another consideration in the decision to issue a preliminary injunction is the requirement that the plaintiff must demonstrate probable success on the merits (*Estee Lauder, Inc.* v. *Watsky*, 323 F.Supp. 1064, 1067 (S.D.N.Y. 1970)) and here the situation is not well enough developed for the Court to prognosticate that result.

It should also be bourne in mind that although the Grissom employees had notice of their termination on July 9, 1972, and the union, officially, by July 13, 1972, it did not seek to demand arbitration or institute suit until the afternoon of July 21, 1972. Meanwhile, the Company was recruiting, hiring and training other employees. The equities, then, are not without a semblance of balance.

REMAND

In candor, this Court was gravely concerned over the issue of remand to the state court, especially because of its firm (albeit not entirely objective) belief and complete confidence in the competence and ability of the state court. Particularly was this concern manifested when considering the implications of a potential contempt action.

However, there are overriding considerations not the least of which is the urgency inherent in this type of situation. (Parenthetically, an urgency recognized by the Court and responded to within its capabilities and other court commitments.) More important, certainly, is the suggestion of Judge Moody that the matter be handled by this Court with dispatch.

Considered, also, was the fact that Judge Moody dissolve the injunction even though there had been a hearing relating to the alleged refusal to obey its terms and the fact again that the plaintiff did not act with the utmost diligence.

The recent case of *Grubbs* v. *General Electric Credit Corp.*, 40 U.S.L.W. 4388 (U.S. April 18, 1972), buttresses this approach in this area of mutual jurisdiction and removal.

Nor does this Court ascribe to defendants' counsel any such nefarious purposes and intentions as plaintiff would have it. Time was a factor, then, as it is now and the Motion to Remand is denied.

An order may enter in accordance with the foregoing.

By: /s/ Philip Pratt
PHILIP PRATT
United States District Judge

Dated: August 22, 1972.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO, *Plaintiffs,* vs. HOWARD JOHNSON COMPANY, INC., a Maryland corporation; P.L. GRISSOM & SON, INC. and BELLEVILLE RESTAURANT COMPANY, INC., Michigan corporations, *Defendants.*	Civil Action No. 38654

ORDER

At a session of said Court held in the Court House in the City of Detroit this 25th day of August, 1972.

PRESENT: The Honorable PHILIP PRATT
United States District Judge

This matter having come on to be heard by the Court on the Motion of Plaintiff, Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, to compel Arbitration by Defendants, for certain other injunctive relief and to remand this cause to the Circuit Court for the County of Wayne, State of Michigan and this Court being fully advised in the premises.

IT IS HEREBY ORDERED that Defendants, Howard Johnson Company, Inc. and Belleville Restaurant Company, Inc. and P. L. Grissom & Son, Inc., arbitrate with Plaintiff, Detroit Local

Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, issues arising under the collective bargaining agreements between Plaintiff and Defendants, Belleville Restaurant Company, Inc. and P. L. Grissom & Son, Inc., effective January 1, 1968 and August 1, 1968, respectively, relating to the obligation and liability of Defendants to Plaintiff and to the employees represented by Plaintiff under the provisions contained in the aforesaid agreements pursuant to the Memorandum Opinion of the Court issued on August 22, 1972.

IT IS FURTHER ORDERED that the Motion for Injunctive Relief to return to work the approximately 53 employees separated from employment at the Belleville facilities and the Motion to Remand this cause to the Circuit Court for the County of Wayne, State of Michigan is denied.

PHILIP PRATT
United States District Judge

U. S. District Court)
Eastern District of Mich.) ss

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

FREDERICK W. JOHNSON, Clerk

By: /s/ Donald M. Currie
Deputy Clerk

Dated:

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, AFL-CIO, *Plaintiff,* vs. HOWARD JOHNSON COMPANY, INC., a Maryland corporation; HOWARD JOHNSON MOTOR LODGE, INC., a Michigan corporation; and BELLEVILLE RESTAURANT COMPANY, INC., a Michigan corporation, *Defendants.*	Civil Action No. 38654

MEMORANDUM AND ORDER GRANTING STAY PENDING APPEAL

Plaintiff instituted its suit under Section 301 of the National Labor Relations Act, 29 U.S.C. § 185 (1971), seeking to compel arbitration. Plaintiff, in addition, sought to compel defendant Howard Johnson to hire or refrain from discharging employees belonging to plaintiff who had been employed by the Grissom interests prior to the takeover by defendant Howard Johnson of the restaurant and motor lodge operations. This Court ordered that defendant Howard Johnson arbitrate but denied the prayer regarding the employees.

Defendant Howard Johnson has filed its Notice of Appeal and is proceeding expeditiously in that regard. It now requests a stay of the order compelling arbitration under Rule 62(c).

Rule 62(c) provides as follows:

> "When an appeal is taken from an interlouctory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party."

The order of the Court compelling arbitration is, in its effect, an injunctive order and, as is explicit in 62(c) a stay is a discretionary issue, W. Barron & A. Holtzoff, Federal Practice and Procedure, §1373 (Wright Ed. 1958); 7 J. Moore, Federal Practice, ¶62.05 (1971).

The Court is persuaded by the analysis and reasoning of *Camden Industries Co.* vs. *Carpenters Local*, 246 F. Supp. 259, (D.N.H. 1964), a case which has great factual similarity to the case at bar. In *Camden*, the Court said:

> "It is the Court's policy to place no impediment in the way of full review of its pronouncements, unless the circumstances of a particular case indicate that to do so would prejudice the rights of a party. In this case, plaintiff has represented to the Court that the preparation and presentation of its position to an arbitrator will involve significant time and expense and the Court has no reason to doubt that this may be true. The Court is convinced that no meaningful prejudice will result to defendants if arbitration of their grievance is deferred, as passage of time will not affect the validity of their claims to higher wages under a now-expired collective bargaining agreement, nor will it affect the measure of their recovery should they be successful."
>
> 246 F. Supp. at 260

(Cf. *Dewey* v. *Reynolds Metals Co.*, 304 F. Supp. 1116 (W.D. Mich. 1969), etc., where first amendment rights were involved.)

Further, by denying the request for a mandatory order requiring defendant Howard Johnson to hire its "predecessors" employees, the Court has already, for the reasons given in its Memorandum Opinion, determined that the equities of the situation do not preponderate in favor of plaintiffs.

Perhaps most crucial, is the recognition of the need for an appellate determination of the major issue in the case – the status of the "successor" employer in the circumstances of this suit. This is particularly true because of the possible impact of the language contained in the recent decision of the Sixth Circuit in *NLRB* v. *Wayne Convalescent Center, Inc.*, ____ F.2d____(Aug. 29, 1972, No. 72-1081).

Any stay of this nature, contested as it is, presupposes diligence, expedition and good faith on the part of those concerned. The Court sees no reason to doubt the presence of those elements.

The Motion for Stay Pending Appeal is, therefore, granted.

PHILIP PRATT
United States District Judge

Dated: October 3, 1972.

U.S. District Court)
) SS.
Eastern District of Mich.)

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

FREDERICK W. JOHNSON, Clerk

By: /s/ Donald M. Currie
Deputy Clerk